No. 11,831

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, co-partners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a corporation),

Appellee.

BRIEF FOR APPELLEE.

E. M. TAYLOR,
H. A. THORNTON,
THORNTON & TAYLOR,
311 California Street, San Francisco, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Texts

No. 11,831

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, co-partners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a corporation),

Appellee.

BRIEF FOR APPELLEE.

AS TO JURISDICTION.

As stated in appellants' brief, page 2, this action was originally brought on the appellants' complaint filed in the Superior Court of Contra Costa County, California, for a sum in excess of $3,000.00, on a claim against the defendant insurance company as a foreign corporation. The action was transferred to the Federal Court by petition for removal on the grounds of diversity of citizenship, the plaintiff being a resident of the State of California and the defendant corpo-

ration a resident of the State of New York. (Transcript pages 2 to 7.)

Removal proceedings to the United States District Court in and for the Southern Division of the Northern District of California were taken pursuant to Title 28, U.S.C.A. Sections 71, 72 and 81. Thereunder, any such action may be removed to the Federal Court if it is one as to which the United States District Court would have original jurisdiction. Under the provisions of Title 28, U.S.C.A. Section 41, the District Courts are accorded original jurisdiction in matters of controversy where the value or sum involved exceeds $3,000.00 and is between citizens of different states.

The final decision or judgment rendered by the United States District Court in said matter (Transcript of Record, pages 29, 30), is subject to review by the United States Circuit Court of Appeals pursuant to Title 28, U.S.C.A. Section 225, except in instances where direct review may be had by the Supreme Court of the United States under Section 345, and which refers to situations where the United States is a party complainant, where the United States as a party has been rendered an adverse decision, where the constitutionality of State Statutes is involved, or with matters relating to the Interstate Commerce Commission.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellants is substantially correct, with the exception that after the loss the defendant did not deny liability solely on the ground that its policy had been cancelled, but denied liability for various reasons which included the statement that liability under its policy had been terminated by substitution by another policy and because of the insured having ratified the acts and conduct of his broker. As will hereinafter appear, also, Otis & Browne as brokers for the plaintiffs, and appellants in this case, obtained the new policy, that is, the one with the Home Fire and Marine Insurance Company, solely for the purposes of replacing the policy of the Merchants, and which policy appellants accepted and under which they obtained payment. Said brokers during all the times mentioned were handling appellants' entire insurance portfolio.

There are essentially two questions involved: first, with respect to the extent of the authority of Otis & Browne as insurance brokers for plaintiffs and appellants, and, secondly, whether or not there was ratification by plaintiffs and appellants of the acts and conduct of their brokers so as to terminate liability under the policy issued by appellee.

ARGUMENT OF CASE.

SUMMARY.

Otis & Browne, in this instance, were general insurance brokers for the appellants, exercising a larger authority and occupying a different capacity from a broker obtained merely for the purpose of issuing policies of insurance and whose agency would be terminated upon the completion of that event. This conclusion is primarily based upon the acts of the brokers in writing special forms of coverage for the appellants and having been in charge of the insureds' entire insurance portfolio.

Ratification of the brokers' acts in substituting policies occurred in this instance when the insureds, having been informed that said brokers had advised the Merchants Fire Assurance Corporation prior to the loss to close their file as their policy had been replaced, and having been informed by said brokers that they had in lieu thereof obtained another policy with another company in the same amount and on the same conditions, in fact accepted said new policy, made claim thereon, collected thereunder, and as to which liability was conceded to them by said new company. It was and is the position of the appellee that if the insureds accepted the benefits of the brokers' acts on their behalf in that respect, they must likewise adopt the brokers' purposes and what might be called the detriment that might result to them therefrom in having in effect terminated the liability under the Merchants' policy.

While the appellants' brief is divided into numerous subdivisions, the sum and substance of the argu-

ment presented is that as a policy of insurance only has one cancellation clause, that unless the provisions thereof are carried out there can be no termination of liability by the insurance company. We feel that argument on such a question is entirely beside the point and outside the issues of this case. We consider, furthermore, that cases dealing solely with the cancellation clause of the policy have no significant bearing upon the decision of the questions that are presented in this matter. It is not contended by the appellee, nor has it ever been contended, that it sent out a notice in conformance with the cancellation clause of the standard policy. It is, on the other hand, our position that a termination of the liability under the policy was effected prior to the loss by mutual agreement, and that thereby in effect the policy was cancelled. The use, therefore, of the word "cancelled" is to a certain extent misleading. It is and has been the further position of the Merchants Fire Assurance Corporation that regardless of any question of the extent of the brokers' authority there was in legal effect a ratification by the claimants of the substitution of policies, the acceptance of the one carrying with it the termination of liability under the other.

ON THE QUESTION OF THE AUTHORITY OF THE BROKER.

The facts and the evidence in support of this question are comparatively brief. In the stipulation of facts it is set forth that at all times from February 6, 1945, to July 23, 1946, which included the time of the fire, and thereafter, Otis & Browne, Inc., were act-

ing as insurance brokers for the plaintiffs. (Transcript of the Record, page 14, paragraph 3.) One of the underwriters of the Merchants Fire Assurance Corporation, Mr. Ritch, testified that about February 6, 1945, and over a year before the fire, Mr. Browne of Otis & Browne visited the office of the appellee with a letter signed by one of the appellants instructing the Merchants to recognize Otis & Browne as their brokers. (Transcript of Record, page 48, lines 4 to 15, page 49, lines 21 to 30.)

While this was denied by the broker, we submit that in such an instance where the policy had been originally issued by a different broker, it was quite logical and conceivable that the insureds would have supplied the new broker with some letter of authorization. Testimony of this witness is further confirmed by the fact that he had at the time made a notation on the company's daily report, which is its record of the policy that had previously been issued. Regardless of whether or not there was a conflict in the evidence as to appellants having written a letter as to Otis & Browne acting as brokers for the appellants, there is, nevertheless, no conflict whatever that Mr. Browne notified appellee as well as all of the other companies, that they had taken over as brokers for the appellants. (Transcript of Record, page 69, lines 18 to 21.)

On the same occasion, Witness Ritch testified that Otis & Browne presented two endorsements to them that said brokers had prepared to be attached to the policy of insurance. (Transcript of Record, page 50,

lines 1 to 27.) There is no dispute in the record with regard to the fact that the brokers prepared the endorsement appearing on the policy (Plaintiffs' Exhibit No. 1) and we direct the Court's attention to the fact that this form is in considerable detail and consists of four pages of closely typewritten matter. It indicates the exercise of a considerable discretion and general authority on the part of these brokers acting for the appellants in changing the form of insurance, revising various paragraphs and conditions and inserting special clauses, which is entirely inconsistent with the mere authority of a broker employed to obtain the issuance of a policy of insurance for an insured. As a matter of fact, the preparation and handling of this endorsement by the brokers shows that they had full and complete charge of the appellants' insurance business, which fact was fully supported by the testimony of their witness, as follows:

"(Testimony of Edward Rambo Browne.)

Cross-Examination.
By Mr. Taylor.

Q. Mr. Browne, you say that you took over the representation as an insurance broker of the plaintiffs in this case some time in December of 1944?

A. That is approximately correct.

Q. And as the questions have been brought out by Mr. Hauerken, prior to that time as to this particular policy a different broker had acted on it, isn't that so?

A. That is true.

Q. And you were substituted in the place of that broker who had issued the policy and handled the plaintiffs' insurance, is that correct?

A. Our firm was substituted.

Q. And you handled from and after that time their entire insurance portfolio, did you not?

A. That is true.

Q. It was not an appointment designating you for the issuance or the obtaining of any single policy, is that not so?

A. That is true."

(Transcript of Record, page 68, lines 1 to 22.)

While it is true that a broker employed merely to obtain or write a policy of insurance is not thereby rendered the insured's agent to accept cancellation notice, the rule is quite the contrary where his employment is more extensive, such as where the broker takes care of all the insured's insurance business.

> "The broad rule must, however, be modified if the agency is a general one, and not merely a special agency for that particular policy. *A notice canceling a policy given to a broker employed generally to look after all of the policy holders' insurance business, and who has exercised such employment continuously for a considerable period, is sufficient.* This is the principle underlying the leading case of Stone v. Franklin Ins. Co., 105 N. Y. 543, 12 N. E. 45, and it has been approved and followed in numerous well-considered cases.
>
> Reference may be made to White v. Insurance Co. of New York (C.C.) 93 Fed. 161; Parker & Young Mfg. Co. v. Exchange Ins. Co., 166 Mass.

484, 44 N. E. 614; Faulkner v. Manchester Fire Assur. Co., 171 Mass. 349, 50 N. E. 529; Buick v. Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337; Kooistra v. Rockford Ins. Co., 122 Mich. 626, 81 N. W. 568; Edward v. Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881; Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85; Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. 921, affirming 48 Hun. 621, 1 N. Y. Supp. 387; Johnson v. North British & Mercantile Ins. Co., 66 Ohio St. 6, 63 N. E. 610; John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

In another leading case (Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502) the rule thus laid down was said to apply even where the insurance agent acts as broker for the insured, and especially where he exercises his own discretion in selecting the companies among which the risk is to be distributed (Dibble v. Northern Assur. Co., 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470). So, where the insured employed an insurance agent to keep certain property continually insured for a certain amount, part of the insurance being taken in companies represented by the agent, and part through other companies (Schauer v. Queen Ins. Co. of America, 88 Wis. 561, 60 N. W. 994), such agent must be regarded as a broker, and authorized to receive for the insured notices of cancellation.

But if the agent agrees with insured to look after the business and keep up the insurance, the insured having no choice of companies, the agent has authority to accept for the assured, or to waive the five days' notice of cancellation, pro-

vided for in the policy, and obtain a new policy from another company.

Allemania Fire Ins. Co. v. Zweng, 127 Ark. 141, 191 S.W. 903; Farrar v. Western Assur. Co., 159 P. 609, 30 Cal. App. 489, application for rehearing in Supreme Court denied 159 P. 611, 30 Cal. App. 489; National Union Fire Ins. Co. v. Macon Hardwood Lumber Co., 24 G.A. App. 726, 102 S.E. 180; Aetna Ins. Co. v. Renno, 96 Miss. 172, 50 So. 563; Orkin v. Standard Fire Ins. Co., 99 N.J. Law, 114, 122 A. 823; Dalton v. Norwich Union Fire Ins. Soc. (Tex. Com. App.) 213 S.W. 230, Reversing (Civ. App.) 175 S.W. 459; Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co. (W.Va.) 92 S.E. 858."

Cooley's Briefs on Insurance, Vol. 5, 4595, 4596.

In the case of *Farrar v. Western Assur. Co.,* 159 Pac. 609, 30 Cal. App. 489, it appeared that the owner of furniture had authorized a broker to obtain insurance in the amount of $1,000.00 on said property. She had $500.00 insurance through another party. Each year when the policy would expire, the broker would renew it and the assured would pay the premium. On one occasion a small fire loss occurred and the adjuster and the broker attended to the adjustment satisfactorily, and the assured then told him to take care of her insurance and to keep her covered in a good company in the amount of $1,000.00. The policy in question was with the St. Paul Fire and Marine Insurance Company, and said company notified the broker that it wished to cancel its policy and gave him the usual five day cancellation notice. The

broker was unable to contact the assured and thereupon obtained a policy in a similar amount or made an agreement for such insurance with the defendant, Western Assurance Company. A few days thereafter, loss occurred without the policy having been issued. The Court held that there was an oral agreement for insurance, and on the question of the broker's authority to place such new insurance for the insured, the Court stated as follows:

> "We think the defendant is liable. Perhaps when Coleman placed the first insurance for Mrs. Plier he was merely an insurance solicitor, whose authority was quite limited, but later, as we have seen, she extended his authority by telling him 'to take care of her insurance and to see that she was covered to the amount of $1,000.' At another place in the record she is shown to have testified as follows:
>
> 'A. About the Western Assurance, I never told him what company to insure me in. I just said, Insure me for $1,000, and that was all. As long as it was covered, that is all I cared.
>
> Q. As long as it was covered?
>
> A. Yes, sir.
>
> Q. It says, "I looked upon him as a solicitor only."
>
> A. I don't know about solicitor—I only told him to insure me and keep me insured.
>
> Q. To keep you insured?
>
> A. To keep me covered—that is all I cared —as long as I was in a good company.'
>
> Coleman's testimony we think tends to corroborate the testimony of Mrs. Plier; but we are satisfied that the direction by Mr. Plier to Cole-

man just referred to made him more than a mere soliciting insurance agent, and constituted him, as found by the court, her general agent to keep her insured to the extent of $1,000 in respect to the property here involved. Being her general agent for this purpose, we think he was authorized, as an incident of his employment, to accept and to act upon a notice of cancellation. Stevenson v. Sun Ins. Office, 17 Cal. App. 280, 119 Pac. 529.

> 'A general agent with power to insure property and to keep it insured may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company.' 22 Cyc. 1447; Aetna Ins. Co. v. Renno, 96 Miss. 172, 50 South, 546; Phoenix Ins. Co. v. State, 76 Ark. 180, 88 S.W. 917, 6 Ann. Cas. 440; Schauer v. Queen's Ins. Co., 88 Wis. 561, 60 N. W. 994; Todd v. German-Am. Ins. Co., 2 Ga. App. 789, 59 S.E. 94.
>
> But even if Coleman were not the general agent for the assured, still the finding of the court as to his authority would have to be sustained on the theory that his action in procuring the policy in the defendant was ratified by his principal. In filing her claim of loss and demanding payment, she ratified the action of her agent. The authorities seem to hold that a ratification, though made subsequent to a loss, is valid."

Thus it is that while other jurisdictions may adopt different rules, California has recognized that a broker handling an insured's business is not limited

in his authority to that of a broker employed solely to procure insurance.

The reason for this rule is rather obvious. There are many instances where one asks a broker to obtain policies of various kinds, but under such conditions it would be illogical to permit such a one to act on other matters without specific instructions—especially where it resulted in an alteration of the insured's position, such as the taking away from him of insurance protection. On the other hand, where the broker has a continuing employment and is in charge of the insured's insurance business, he is the proper one to modify forms, enlarge or decrease insurance portfolios and to generally select and change the companies with whom policies are carried.

By this decision also California has adopted a different rule from some states with regard to ratification after loss.

A reading of this decision discloses that apparently the insured obtained some settlement or payment from the St. Paul Fire and Marine, the company that carried the original policy, and the Appellate Court of California expressed some curiosity as to the basis that the insured there might have made claim from said insurance company, and which company occupies a similar capacity to the Merchants in this instance. The particular question, however, not being one before the Court, was not probed further.

Considerable discussion and comment has occurred with regard to the failure to cancel the policy in ac-

cordance with the cancellation clause and inferring that unless those steps and that procedure were followed out there could be no termination of the Merchants' liability by other means. This contention is, of course, conclusively refuted in *Stevenson v. Sun Ins. Office,* 119 Pac. 529, 17 Cal. App. 280, in which rehearing was denied by the Supreme Court of this State. There the insured had ordered $30,000 of insurance that was obtained by the broker and subsequently requested that it be reduced to $25,000. The broker thereupon went to the defendant insurance company and informed them that the insured had ordered their policy cancelled. Before further action could be taken, fire destroyed the property that evening. The assured contended that the broker was his agent for the purpose of negotiating and placing insurance, but was not his agent for the purposes of cancellation. With this contention the Court disagreed and it was held:

> "There is no merit in the contention discussed and urged by plaintiff that the contract of insurance in the case at bar cannot be considered as canceled merely because the policy in controversy was not formally and physically surrendered into the possession of the defendant prior to the fire. A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties. It is a self-evident proposition that a contract of insurance may be as readily rescinded, as it was made, by the mutual agreement of the parties or their authorized representatives; and,

> while the surrender of a policy of insurance by the insured and its acceptance by the insurer is usually prima facie evidence of cancellation, yet a formal physical surrender is not absolutely necessary to a rescission and cancellation of the contract. The formal surrender and acceptance of the policy is at best a piece of evidence tending to show a cancellation, and, if the fact of rescission is established (as we think it was in this case) by the mutual agreement of the parties, the rescission is as complete and effectual as if the policy had been actually indorsed 'canceled', and surrendered into the possession of the defendant.''

The situation in this case is quite different from the circumstances contended for by appellants with regard to the authority of a broker employed solely to procure insurance. The very fact that he is employed solely to procure insurance indicates a qualified and restricted agency. On the other hand, here we do not have any qualifications to the broker's authority or his agency. He was the general insurance broker for the appellants, who quite apparently instructed him to contact all the insurance companies and so inform them, with no information being conveyed to them, nor apparently any instructions having been given, that the brokers were to be considered as having any limited authority. The undisputed facts are, as established by the testimony of the appellants' own witness, that the broker had entire and complete charge of the appellants' insurance portfolio, and it would seem, therefore, that it was fully within the

scope of their authority to adjust lines, take out new policies, replace and substitute other policies, and generally to keep the insureds' program in force and effect for appellants. Furthermore, as we have heretofore indicated, the very fact that these brokers had prepared extensive and involved endorsements shows a supervision and authority to handle matters for the appellants other than the mere procurement of policies.

AUTHORITIES CITED BY APPELLANTS.

An examination of the cases cited by appellants will show that they are all distinguishable on the facts or for other reasons. *Lauman v. Concordia Fire Ins. Co.,* 195 Pac. 951, 50 Cal. App. 609, involved a situation where a cancellation notice was given by the insurer to a broker, and the Court held that there was merely an employment to procure a policy which ended when that policy had been obtained and delivered.

Appellants then refer to other California decisions as holding to the same effect. Among these is *Emery v. Pacific Employers,* 67 Pac. (2d) 1047, 8 Cal. (2d) 663, which was a suit on an automobile liability policy with the question arising as to whether various other policies of the insured had been cancelled contrary to the insured's specific representations. On this question, the Court merely said that an agent to procure insurance is not an agent for cancellation and a notice to him is not notice to the insured. Even there, however, the Court felt that the agency might be such as to bind the insured, for it was said:

"In the instant case it would seem that upon the testimony of Bronis the jury might have found that Strother & Strother were acting as agents for Bronis for cancellation as well as procuring of insurance. Bronis testified that Strother & Strother would be better able to answer a question as to whether cancellation notices had been received on his policies than he himself would; that if he received anything he turned it over to Strother; that he had nothing to do with the insurance, and that he had implicit faith and confidence in Strother. It also appeared that Strother & Strother carried on correspondence with the insurance companies upon certain of the policies after their issue."

In *Quong Tue Sing v. Anglo Nevada Assurance Company,* 25 Pac. 58, 86 Cal. 566, the insurer's local agent contacted the broker who had obtained the policy relative to cancelling same, and the broker then went to the insured and informed him that the policy had been cancelled and offered a policy in a lesser sum. A partial tender of refund of premium was made. The assured, however, refused to accept same and the Court held that the broker was not the insured's agent for the purpose.

Lauman v. Springfield Fire & Marine, 195 Pac. 50, 184 Cal. 650, is where the insurer and the insured agreed on July 10th that the policy was cancelled, but that the policy had a mortgage clause giving the mortgagee protection for an additional ten days within which time a fire occurred. The insurer there contended that the mortgagee had told the insured to

look after the insurance, and that thus the insured had been his agent and the mortgagee would be bound by the cancellation agreement. In this respect the Court had the following to say:

> "It is held in Farrar v. Western Insurance Co., 30 Cal. App. 489, 159 Pac. 609, 611 (see, also, Edwards v. Home Insurance Co., 100 Mo. App. 695, 73 S.W. 881), that where a broker or agent is employed to keep the property insured, he had the authority to cancel as well as to procure insurance. But the authority to keep the property insured would not be authority to consent to a cancellation of insurance which would leave the property wholly without insurance. In this case the effect of the agreement to cancel the insurance was to leave the mortgagee without any protection, although the contract already in force entitled him to protection for ten days. However, the relationship between Luman and Dodd was not that of principal and agent. They were mortgagor and mortgagee, and their relation to the property was fixed by the mortgage and by the policy of insurance wherein it was specifically agreed that the notice of cancellation should not be effective against the mortgagee until after ten days' notice in writing to him."

We believe these decisions in California rather clearly show that in this State such an agent for the insured as was there involved, or who occupied the capacity such as Otis & Browne in this instance, and who obviously had authority to keep the property insured, would likewise have authority to cancel policies or to accept cancellation notices.

The next case referred to under this subdivision by appellants is *Hooker v. American Indemnity,* 54 Pac. (2d) 1128, 12 Cal. App. (2d) 116, which was a suit on a different form of policy, same being a liability policy for the benefit of the public. The broker, upon misunderstanding instructions from his insured, cancelled the policy, and the Court declared that generally a broker who only procures insurance has no authority to effect a cancellation. The very reference to the word "generally" indicates that in many instances and in varying circumstances the Court recognized that the broker would have such authority. It is further said that in that instance there was no evidence that the broker was a general agent for the insured instructed to handle his insurance in a general way.

Cronewett v. Iowa Underwriters, 186 Pac. 824, 44 Cal. App. 571, has no bearing whatever upon the issues before this Court. It is there contended that an agent of the mortgagee to cancel and replace policies would also bind the assured mortgagor. Disposing of the question, the Court merely commented on the fact that an agent employed to place insurance is not *thereby* rendered an agent to cancel the policy.

The final case to which appellants have referred on the matter of authority is *Tarleton v. DeVeuve,* 113 Fed. (2d) 290. The broker had obtained a policy and later when the premium was not paid he returned the policy to the insurer without the insured's knowledge. The insurer, however, did not accept the return

of the policy but demanded an earned premium for the time that it had been in force and during this period a fire occurred. The insurance company then reversed its position and contended that the policy had never been in effect, and in any event that it had been cancelled. This Court, in reviewing that case, said that under *Stevenson v. Sun* and *Farrar v. Western Assurance,* heretofore referred to, they would have held that the policy had been cancelled, but that under subsequent California decisions this result would not be permitted if the insured were thereby to be left wholly without insurance. In this respect this Court had the following to say:

> "If there were no other cases from California to guide us, we might feel an obligation to sustain appellees' position as to the effect of the attempted cancellation on Mrs. McElligott's claim. However, these cases have been distinguished and the principle involved elaborated in more recent decisions from the California courts. Thus, in the case of Lauman v. Springfield Fire, etc., Ins. Co., 184 Cal. 650, 652, 195 P. 50, 51, the court said: '* * * It is held in Farrar v. Western Assur. Co., 30 Cal. App. 489, 159 P. 609, 611 * * *, that where a broker or agent is employed to keep the property insured, he had the authority to cancel as well as to procure insurance. But the authority to keep the property insured would not be authority to consent to a cancellation of insurance which would leave the property wholly without insurance.' In the case at bar, if there had been a cancellation, the property would have been wholly without insurance."

In the pending matter, the plaintiffs and appellants, without taking into account the policy of the Merchants, had all the insurance they had ever ordered or had requested their brokers to obtain. The rule of law in California as recognized by the foregoing decisions would, under the circumstances that exist here where the brokers had obtained a valid and new policy to replace that of the appellee, clearly deny recovery. To permit otherwise would in effect occasion a double recovery.

In other words, it appears rather clearly that as far as these insureds are concerned, they desired $300,000.00 total insurance prior to the fire. They had never given any instructions for any additional policies, and it would appear they did not wish to assume the liability for any additional premiums. Quite obviously they felt that such insurance schedule was sufficient for their purposes. On the other hand, if they were to recover from the appellee in this instance they would recover on the total of $315,000.00 insurance, as to which additional $15,000.00 they would have had no knowledge prior to the loss in question. Upon subsequently ascertaining that the brokers had obtained insurance with the Home Fire and Marine Insurance Company solely for the purpose of replacing appellee's policy, and as to which they had informed the Merchants to close their file as their policy had been replaced, they would ask this Court to permit them to accept and take advantage of that policy, but to repudiate and deny the terms under which and the purposes for which their

brokers had obtained it. If it were the fact that said company had repudiated its policy, or that the insureds would suffer detriment whereby the brokers had altered their insurance schedule, possibly a different result would have been called for.

On the matter of ostensible agency it is provided by the Civil Code of California:

> "Authority Limited to Appointment—An agent has such authority as the principal, actually or ostensibly, confers upon him."
>
> *Civil Code,* Sec. 2315.

> "Ostensible Authority—Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."
>
> *Civil Code,* Sec. 2317.

The defendant in this instance would have had no reason to communicate with Otis & Browne except for plaintiffs' having intentionally sent them to defendant with evidence of their authority to write endorsements for plaintiffs and as to their supervision of plaintiffs' insurance. Defendant was fully justified in thereafter giving notice to terminate liability to the brokers and in relying on their advice that a substitution of policies had been effected. Under these facts, there is a clear estoppel against plaintiffs' repudiating or denying the authority of their agents, the effect of their acts and conduct or of the effect of defendant having relied thereon.

> "An agent represents his principal for all purposes within the scope of his actual or ostensible

> authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."
>
> *Civil Code,* Sec. 2330.

It is quite apparent that if it had not been for the brokers' letter to the Merchants, the latter would have sent out a formal cancellation notice to the insured.

> "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof."
>
> *Civil Code,* Sec. 2334.

Appellants complain of the fact that ostensible agency is not applicable to this case for the reason that such ostensible authority is solely determined by the conduct of the principal and not that of the agent. But in this instance, it is our contention that it was the conduct of the insureds which directly caused and induced the insurance company to contact the brokers and to rely on them.

Objection is further raised by the appellants in regard to the admission in evidence of defendant's exhibits B and C. These letters were perfectly proper, not only for the reason that they corroborated the testimony of the witness Browne as well as the agreed statement of facts, but likewise in view of the extent of the brokers' authority as heretofore established, they were binding on the insureds, and in establishing that after having been informed that their policy

had been replaced and that they could close their file, the Merchants Fire Assurance Corporation had relied upon them to the extent of taking no further action. It is quite obvious from the nature of the communications that if they had not been received formal cancellation notice would have gone out prior to the loss in question.

ON THE QUESTION OF RATIFICATION.

As appears from the Record the original exhibits B and C have been sent up to this Court from the District Court rather than having been set forth in the Transcript of the Record. (See pages 34 and 35 Transcript of Record.) It appears that about six weeks prior to the occurrence of the fire the Merchants Fire Assurance Corporation addressed appellants' brokers as follows:

> "Will you kindly cancel this policy and return it to us for pro rata cancellation? The company has requested us to retire from the liability because we are no longer willing to accept this classification. If you would prefer, we can send cancellation notice direct to the assured. However, we will not do so unless you specifically instruct us."
>
> (Transcript of Record page 52, lines 17 to 24.)

Thereafter, and about three weeks before the fire, said company, not having had any reply from Otis & Browne, sent them a letter in the following form:

> "Re: Policy No. 8604, Technical Porcelain Company.

> We are following up a letter written to you on April (16) 10th asking for cancellation of this policy.
>
> We understood that you were going to relieve us of liability as soon as possible although no definite date was set for the termination.
>
> Will you kindly follow this up and endeavor to have our policy returned within the next ten days?"
>
> (Transcript of Record page 55, lines 7 to 17.)

Several days thereafter this letter was returned to appellee by Otis & Browne with the notation on it, "You may close your file as this has been replaced as of April 10th, 1946. Policy is at Mechanics Bank Richmond and will require some time to secure unless you wish to send cancellation notice dated ten days prior to April 10th, 1946." Appellant raises some contention with regard to this note to the effect that it indicated to the insurance company that the brokers did not have authority to act and that the company should send cancellation notice out to the insureds. On the other hand, we believe this note indicates just the contrary. In other words, the brokers were referring to the return of the policy to the insurance company and that they could not get it for some time and that, therefore, if the insurance company wished to send out a predated cancellation notice, it probably would have no concern about a return of the policy. The significance of this language relates solely to the statement by the insurance company that they wished their policy returned within the next ten days.

The fact is that the brokers did not feel that any further notice or advice to the insurance company was called for, for it appears in the stipulation of facts that, upon receipt of the first mentioned letter some weeks previously from the Merchants, Otis & Browne had immediately gone out and obtained a policy of fire insurance with the Home Fire and Marine in the same amount of $15,000.00 insuring plaintiffs on the same property from that very day for a period of three years. This last mentioned company never at any time denied or questioned its liability under said coverage, and, upon claim being made by appellants, it paid them the very same sum that said appellants are claiming in this action from appellee. (Transcript of Record pages 14 and 15, paragraphs 4, 5, and 8.)

Witness Browne affirmed the fact that his reference to having "replaced" the policy of the Merchants specifically referred to the policy of the Home Fire and Marine Insurance Company. (Transcript of Record page 71, lines 10 to 22.)

In line with what is said in the case of *Farrar v. Western Assurance Company* at the bottom of page 9, the appellants, in making claim for and demanding payment under the Home Fire and Marine policy, ratified the authority and acts of the brokers in obtaining said policy, and as will appear from the case of *Finley v. New Brunswick Fire Insurance Co.,* 193 Fed. 195, appellants had the right to claim under one policy or the other and, having accepted the new policy and obtaining reimbursement thereunder, they

likewise must be held to have adopted the object and purpose for which said policy was obtained, namely to replace that of the Merchants.

In said case the defendant's agent had looked after plaintiff's insurance for some years. On August 16, 1910, defendant requested its agents to pick up their policy. Rogers & Rogers, the agents, received this request on August 20, 1910, and on the same day obtained for plaintiff a policy with the Western Empire Insurance Company in the same amount as defendant's policy and on the same property. On the next day the property was destroyed. After the fire, plaintiff accepted the Western Empire policy from Rogers, but refused to relinquish defendant's policy on being told that said company had requested that it be cancelled.

Plaintiff sued both companies and recovered from the Western Empire.

The Court said:

> "The Western Empire policy was taken out by Rogers & Rogers assuming to act for plaintiff, for the purpose of replacing the policy in suit, which they had been instructed to pick up and retain, and not for the purpose of increasing the amount of insurance already on the property. * * * On the morning of August 20th, the property was insured in the sum of $7,500, or in one and one half times its full or sound value; the plaintiff had not applied for further insurance, and did not know that such an application had been made in his behalf. The new policy was taken out immediately upon receipt of instruc-

tions to cancel one of the existing policies, and manifestly as a substitute for the existing policy, and not as new or increased insurance. Under these circumstances the property was never insured in excess of $7,500, and was never covered by more than three policies. And assuming for the purposes of this case that Rogers & Rogers had no authority to cancel the policy in suit, or to substitute another policy in its place, yet, when the plaintiff was informed as to what had taken place, it was incumbent on him to elect which policy he would claim under. If Rogers & Rogers acted without authority, he might disavow their acts, and claim under the three old policies which were in force at the time of the fire, or he might ratify the substitution which his agents had made in his behalf, and without authority; but manifestly he could not do both. He could not claim the benefit arising from the act of his agents in taking out a policy, and at the same time repudiate the object and purpose for which the new policy was obtained. These conclusions would seem inevitable from a mere statement of the facts, and are amply supported by the authorities.

In *Arnfeld v. Guardian Assur. Co.,* 172 Pa. 605, 34 Atl. 580, the insurance broker acted, or attempted to act, for both parties in substituting one policy for another, as was done in this case, and the trial judge was requested to instruct the jury as follows:

> That 'if the jury believe from the evidence that the plaintiffs, by their agent, Charles Zugschmidt, on the 10th day of May, 1893, took out a policy in the Queen Insurance Company

for $2,500 upon the same property as that covered by the policy in suit, and that their purpose in so doing was not to increase their line of insurance, but to substitute the policy in the Queen in the place of the policy in suit, because the defendant had given notice on the 8th of May, 1893, to cancel the policy in suit within five days, in accordance with its terms, and the Queen Company recognized their responsibility, and paid the plaintiffs the amount covered by their policy, the moment the risk was covered in the Queen, the policy in suit was thereby cancelled, the defendant released, and the verdict should be for the defendant.'

This request was refused, and in reversing the judgment, the Supreme Court said:

'The court below being of opinion that as plaintiffs had the right to take out double insurance, and as the five days in which they were requested to have the first policy cancelled had not expired at the date of the fire, and as the policy was still in possession of the plaintiffs, without any direct return to them of, or offer to return, unearned premium, the policy was still in force, declined to give the instruction prayed for. The only question, then, is, Should this point have been affirmed? It may be conceded that there was no formal, technical cancellation of the policy issued by the defendant. It was in possession of plaintiffs. Defendant had not returned or offered to return to them the premium. But was there a substitution of the liability of a third party for that of the defendant by the consent of the plaintiffs, defendant, and the third party? Defendant's

contract was one of indemnity in a fixed amount against loss by fire on certain goods. A third party, the Queen Insurance Company, took its place, and indemnified plaintiffs against precisely the same loss, in the same amount, on the same goods, then stood by its contract, and paid the loss. This was a complete and effectual substitution of another insurer in place of defendant, and this by the consent of all parties interested; for it is not important to discuss the exact authority of an insurance broker, as Zugschmidt was, and determine to what extent he was the agent of the insured and the insurers. That is where the line should be drawn. It is undisputed he acted throughout for the plaintiffs and for both companies, and communicated with both; and all consented and ratified his acts. Nor is it controlling that there was no formal cancellation or surrender of the first policy. The plaintiffs got the policy in the Queen Company, and, what is more important, got the money upon it. The premium they had paid to the defendant, in so far as they were entitled to a return of it, is owing by the defendant, through the broker, to the Queen Company, to whom the broker, acting for plaintiffs, transferred defendant's liability. Plaintiffs ought to have surrendered after cancellation defendant's policy. What ought to have been done equity will consider as having been done.' ''

The companion case of *Finley v. Western Empire Insurance Co.,* a Washington decision, 125 Pac. 1012, 69 Wash. 673, involved the suit on the policy alleged

to have been obtained in substitution of one of the others and conforms the decision above referred to. It was the contention of this insurance company that its policy had not been issued, delivered nor accepted prior to the fire, and that the assured had no notice of the broker's efforts to cancel the New Brunswick policy and obtain defendant's policy until after the fire, and the substitution therefor had not been effected. To this contention the Court stated:

> "Here, Rogers & Rogers, acting as agents for respondent, secured the new policy in order to effect a substitution, so as to keep the property insured up to $7,500, which considering the whole record, we think they were authorized to do. Their act was the act of, and their knowledge was the knowledge of, the respondent; and the time limit on the notice of cancellation, being for the benefit of the assured, was waived when they contracted for other insurance. The New Brunswick policy had no binding force after August 20th, for the reason that the agreement to take appellant's policy was in legal effect an acceptance of it."

Under the circumstances involved in the two foregoing cases, it will be observed that the assured was permitted recovery on the policy obtained in substitution of the original one and the original insurer was relieved of liability.

Here, likewise, the brokers had been looking after plaintiffs' insurance for about a year and a half before the loss occurred. Here, the insured also first obtained notice of the events as to substitution after

the fire and refused to return the original insurer's policy. Here, as there, plaintiffs claimed under both policies, but in that instance as distinct from this, the new insurer refused to concede liability.

The facts as presented by the two foregoing decisions are practically identical with those that concern us here. Appellants would endeavor to avoid the effect of these decisions by an inference that the law in California might be different by alluding to the fact that *Kavanaugh v. Franklin Fire,* 197 Pac. 99, 185 Cal. 307, and *Glickman v. New York Life,* 107 Pac. (2d) 252, 16 Cal. (2d) 626, are later decisions. The *Kavanaugh* case deals with an entirely unrelated matter. It does not hold even for the proposition for which appellants cite it, namely that provisions of contract law do not apply to insurance. The case concerns solely the question of the application of the sole and unconditional ownership clause of the California Statutory policy. As an aside the Court says that in decisions bearing upon insurer's responsibility, the policy has been treated more as a commodity than a contract and that rules have been evolved that are not applicable to ordinary contracts. Nothing, however, is said about ordinary rules of contract law not being applicable to insurance policies, but only that in addition thereto there are other principles that are applicable. The particular point there being discussed was the question of the insurance company taking an application for insurance without making specific inquiries and eliciting specific answers, and the effect

that this course of conduct would have in waiving the sole and unconditional ownership clauses.

As far as the *Glickman* case is concerned, it deals with life insurance and surrender values thereunder and comments on the fact that while ordinarily one is presumed to know the contents of his contracts, the elements of estoppel may prevent this rule from applying particularly as it relates to insurance policies. Appellants have needlessly consumed space in their brief and taken up the time of this Court in reading these citations. The *Speegle* case, referred to on page 22 of appellants' brief, revolves around alleged violations of the Cartright Act and the subject of anti-trust combines.

It would likewise be inferred that these cases hold and that there is a principle of law that a policy of insurance is construed strongly against an insurer. That is at best an incomplete statement, the fundamental principle being that if there is ambiguity, the policy having been prepared by the insurance company, such ambiguities would be construed most strongly against the insurer. On the other hand, if there are no ambiguities in the contract, it merely remains for a Court to ascertain the meaning and intent of the terms and no occasion is called for it to be construed more strongly against the one party or the other.

It is, of course, a common thing, and one anticipated in every case involving an insurance company, for the trite remark to be made, as it is here, that a policy

of insurance is one of indemnity, that the premium was paid and that, therefore, the policy should be construed against the company. The principle that is so often overlooked is declared in the *Glickman* case cited by appellants:

> "Policies of insurance create reciprocal rights and obligations, and the relationship created between the contracting parties should be characterized by the exercise of mutual good faith. Couch, Cyc. of Ins. Law, vol. 1, p. 48; see, also, McElroy v. British American Assur. Co., 9 Cir., 94 F. 990, 1000."

By the same token, the reference to the fact as to whether the total insurance of appellants including the policy of the Merchants, was in fact less than the total values and total loss sustained by the appellants, is of no consequence except possibly to endeavor to induce sympathy. The fact remains that if the appellants had desired additional insurance they would have requested it and supplied their brokers with some orders to that effect.

As a matter of fact, we believe the holding in *Strauss v. Dubuque Fire and Marine,* 22 Pac. (2d) 583, 132 Cal. App. 283, to be entirely consistent with the decision in *Farrar v. Western Assurance Company* and *Stevenson v. Sun.* The three cases read together definitely establish the adoption of a principle of law in California recognizing the effect of the substitution of policies. In said case it appeared that the defendant originally had a policy covering the plaintiff, but that a policy in the Merchants Fire Assurance Cor-

poration was obtained in lieu of defendant's policy. The plaintiff contended that there had never been a formal cancellation, but the Court held that the policy was in effect cancelled when another policy was substituted for it.

The facts further were that the defendant Dubuque Fire and Marine Insurance Company had on March 26, 1931, written to the plaintiff's broker, one Coleman, requesting the return of their policy. She requested them not to cancel as it would make the replacement more difficult and to give her a few days. On April 1st or 2nd, 1931, she advised defendant their policy had been replaced, but refused to name the new company. The defendant then issued a cancellation notice but before it could become effective and on April 9th the property was destroyed by fire. It later appeared that the broker had not been able to replace the defendant's policy herself, but with the aid of another broker, she obtained on April 1, 1941, a policy with the Merchants Fire Assurance Corporation, by coincidence the same company that is the appellee here, for the same amount and on the same property as in defendant's policy. Following the fire, plaintiff claimed under the Merchants policy and payment was made by it. After the fire the broker told plaintiff that the Merchants policy was to replace defendant's policy, but plaintiff refused to return the policy of the Dubuque Fire & Marine.

Judgment was in favor of defendant and said judgment and the following finding was upheld by the Appellate Court of California:

"And the court finds that on the 1st day of April, 1931, and prior to the occurrence of the fire referred to in the amended complaint, the policy issued by defendants was cancelled. * * * And the court finds that prior to the time of the fire another insurance policy, to-wit: a policy of the Merchants Fire Assurance Corporation of New York, in the amount of $3000.00 and on the same property described in the policy issued by defendants, was substituted for and accepted by the plaintiffs in lieu of the policy which had theretofore been issued by the defendants; and the policy of the defendants was cancelled. * * * The court further finds that the policy of the defendants referred to in the amended complaint was cancelled by consent of the parties prior to the time of the fire."

The Court said:

"It is next asserted that the policy issued by the defendants was never cancelled. If the plaintiffs mean that the policy was never indorsed in ink 'canceled', then their contention conforms to the facts. However, an insurance policy is in effect canceled when another policy is substituted for it. Stevenson v. Sun Insurance Office, 17 Cal. App. 282, 288, 119 P. 529; New Zealand Ins. Co. v. Larson Lumber Co. (C.C.A.), 13 F. (2d) 374. That in the instant case there was a substitution is clearly supported by the evidence. It may be claimed that there was a conflict in the evidence, but that conflict was addressed to the trier of the facts.

It is again asserted that the policy was in full force and effect at the time of the fire. As we

have just seen, in discussing the previous point that the finding of substitution must stand, it follows that the policy was not in force or effect at the time of the fire."

The facts in the above case are not set forth in the opinion but are, of course, disclosed by the record and briefs on file with the Appellate Court in said matter and upon which the foregoing comments are based. On its facts the foregoing case is considerably weaker than the pending one in that among other things, the broker Coleman was only one of several brokers handling the insured's business. There was also some question as to whether or not the insured there had requested an additional policy. Appellants endeavor to distinguish said case on the premise that substitution there took place by consent, but that was the finding or conclusion of the Court and there was no consent in the sense that the claimant conceded that question. It is also said that plaintiffs there were denied recovery because they were not the owners of the property, but that is only one of several reasons for the insured's failure to recover. Some exception is taken of the fact that in that opinion reference is made to the *Stevenson* case previously referred to, which it is said only involved the matter of a single policy.

Consistent with the holding in California are also a number of other well-considered cases among which is *Larson v. Thuringia American Ins. Co.*, 208 Ill. 166, 70 N.E. 31. This was an action where the plaintiff insured requested a broker to write $2500 of insurance

which he placed with three companies, and upon obtaining a request by one for cancellation, he replaced it with defendant's policy. The insured knew nothing of the circumstances prior to the fire. Just as here, the plaintiff recovered on the replacement policy and, in suing on the contract that was to have been substituted, the Court denied recovery and stated as follows:

> "The facts as above set forth are undisputed, and the only question remaining is as to the liability of appellee under them. The appellee contends that it is not liable upon two grounds: First, that appellee could and did ratify the acts of Bennett after being fully informed as to them; and, secondly, that, if Bennett was not the agent of appellant, but was the agent of appellee, and by its direction canceled this policy and procured other insurance in the place of it, appellant was fully and fairly informed as to the entire transaction, and he was put to his election whether he would rely upon the policy issued by appellee, or whether he would take the policy issued by the North British & Mercantile Company in lieu thereof, and that he did elect to and did receive the latter policy, and the evidence shows, and it is undisputed, that appellant received from the North British & Mercantile Company the proportion of the loss that it was agreed at the adjustment should be paid by it. Appellant's contention is that Bennett was not his agent for the purpose of canceling or consenting to the cancellation of appellee's policy, and did not represent him when he replaced the insurance covered by appellee's policy in the policy of the North British & Mercantile Company, and that, as he had no knowl-

edge of the transaction until after the fire and the loss had been incurred, it did not lie in his power then to ratify any agreement by which appellee would be released from liability that had become fixed and substitute another therefor, and that appellant received no consideration for such agreement after it was made. It is not claimed by appellant that he was at any time to have more than $2,500 insurance upon his property. The North British & Mercantile Company at no time denied its liability, but acknowledged the same, and paid according to the adjustment. We can see no reason, and none has been pointed out, why appellant could not ratify the acts of Bennett if they were not authorized at the time they were done, if he was fully and fairly informed as to such acts, and why such ratification would not and ought not to be binding upon him. The general rule seems to be that one may ratify that which is done by another if he could have himself done the same thing in the first instance. 1 Am. & Eng. Ency. of Law (2d) Ed. 1184; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. It is said that 'ratification as it relates to the law of agency is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority; and this results as effectually to establish the duties, rights, and liability of an agent as if the acts ratified had been fully authorized in the beginning.' 1 Am. & Eng. Ency. of Law (2d. Ed.) 1181."

In the maritime case of *Walsh v. Tadlock,* 104 Fed. (2d) 131, this Court declared:

> "Appellants further urge that the brokers, who were their agents, had no authority to make arrangement limiting their coverage to the extent found. But they are not in position to claim the benefits of the arrangement and at the same time deny the authority of their brokers to make it."

The foregoing is the identical principle for which we are contending in this instance.

A similar decision to those heretofore referred to by us occurred where both companies denied liability and the plaintiff sued both companies. The facts briefly were that the insured's broker had been requested by him to take his insurance and keep it up. The broker thereupon obtained a $2500 policy with the Northern Assurance, and upon having its request to cancel, he obtained a similar policy with the National Fire intending to replace that of the Northern, and without the insured being aware of the transactions prior to the fire. The Court declared that the broker had authority to accept cancellation and that the liability of the Northern Assurance Company ceased and that of the National Fire began when the latter's policy was issued. A portion of the decision is interesting.

> "By arranging with Mrs. Croley 'to take his insurance and keep it up for him', as he testified he did, appellee authorized her to do for him everything reasonably necessary to be done to keep up the insurance. The assurance company having determined to exercise the right it had to cancel the policy it had issued on the property, it was necessary, in order 'to keep up the insur-

ance', to arrange with some other company to carry the risk. Incidental to this was the cancellation of the policy issued by the assurance company, for appellant's assumption of the risk was to become effective only when the assurance company ceased to carry it. We are of the opinion, therefore, that it sufficiently appeared that Mrs. Croley had power to bind appellee by consenting to a cancellation of the policy, and that acting for him, she consented when she arranged with appellant to take over the risk. We think the testimony warranted a finding that the liability of the assurance company ceased, and the liabilty of appellant began, when Nisbet agreed with Mrs. Croley that appellant would take over the risk of the property. (Citing Ferrar v. Western Assurance, 30 C.A. 489, 159 P. 609, and Stevenson v. Sun, 17 C.A. 280, 119 P. 529)."

National Fire v. Oliver, 204 S.W. 367 (Texas).

AS TO APPELLANTS' CITATIONS ON RATIFICATION.

The principal case cited by the appellants on the question of ratification is *Royal Exchange v. Luttrell,* 63 Pac. (2d) 1240, 99 Col. 492. It is clearly distinguishable in that the new policy obtained by the broker was for a different premium and for a short term. The court there said that the broker had only been employed for the purpose of obtaining a policy and had no further authority. We would call attention to the fact that the decision well may have been different on these facts, for it was there said:

"Not knowing which of the two companies was liable, Luttrell, out of abundance of caution, sued

> both, for the purpose of recovering, not against both, but against the one whose policy the court should decide was in force. The second was to be a substitute for the first and was to be effective as such only upon cancellation of the first."

In *Baker v. North River,* 212 Pac. 118, 112 Kans. 530, while the Court not only held that the broker there had no authority to act, the decision was in part based upon the circumstance that the new policy had been for a different amount, a different premium and included a mortgage clause, and it was said that regardless of anything else the agent would not have authority to write a new and different contract. Significantly, the company issuing this policy had denied liability.

An examination of the reports in *Wilson v. National Ben Franklin,* 246 S.W. 338, indicates that a suit had been filed by the insured on both policies, and it was quite clearly indicated by the Court that recovery would be permitted on one policy or the other, but not on both, in view of the intended substitution.

Peterson v. Hartford Fire, 118 Ill. App. 466, 70 N.E. 757, is not pertinent as it involved an attempt by a mortgagee to substitute policies for the insured and as to fraudulent acts of the insurance company's agent.

Phoenix v. Kerr, 129 Fed. 723, cited by appellants was an action where the insured had filed suit on the second policy and failed to recover. In an action thereafter on the original policy the court in effect

said that if the second policy had not gone into effect by the same token the defendant's original policy was still in force.

The *Scheel* case, referred to on pages 25 and 31 of appellants' brief, turned on the question as to the absence of knowledge by the insurance company of efforts to replace the policy prior to the loss.

Hendricks v. Continental Insurance Company, 121 Penn. Superior 393, 183 Atl. 363, and referred to on page 31 of appellants' brief, will be found to be a case where the insurer's agent was the sole party attempting the substitution of insurance and where the primary insurer, having had a $4,000 policy, was endeavoring to substantiate that said policy had been replaced by one for $2,000. Under the facts there, we believe most courts would have found that no replacement of policies had been effected. We see no necessity for further prolonging this brief by more detailed comment as to these various citations.

It is respectfully submitted that the decision of the District Court in this matter was in conformance with the facts and the law and especially consistent with equitable principles. It conforms with the decided weight of authority and with the principles that have been followed by the courts in California. Following the same line of authorities previously referred to in this brief are other federal decisions, such as *White v. Insurance Company of New York,* 93 Fed. 161, where the insurance company notified the broker to cancel, and, after the broker obtained another policy,

the assured collected thereon. The Court held that the old policy had thus been cancelled. This case was affirmed by the United States Circuit Court of Appeals in *White v. German Alliance Insurance Company,* 103 Fed. 260. It is to be noted also that it was there said that letters passing between the insured's broker and the insurance company are admissible as a link in the chain of proof as to the broker's authority, just as in this instance, the Court said that there was, in addition, evidence that the insured had accepted payment of the substituted policies, and to which the correspondence referred.

We believe it is in order to close this brief with reference to a case in the State of New York, where insurance decisions have long been influential generally. The broker there, had, as here, substituted policies of which the insured learned after the fire had occurred. The decision in part was as follows:

> "It appears that the plaintiff retained the Insurance Underwriters and the Aetna policies, and has collected in full upon them, and is now seeking to collect also upon the policy of defendant. While it was not shown that Fred S. James & Co. had any power to cancel the Russian Transport policy and replace the insurance in other companies, nevertheless the plaintiff, having accepted the two policies with full knowledge that they were taken out in place of the Russian Transport policies, could not keep them and recover upon that insurance without ratifying the act of Fred S. James & Co. in making the substitution, and technically while it might be that the Russian Trans-

port policy was not cancelled at the time of the fire, and had never been surrendered for cancellation, nevertheless the plaintiff was bound to take their position and return the Russian Transport policy for cancellation or refuse to accept the Insurance Underwriters and Aetna policies in place thereof. The plaintiff could not ratify the act of the agents insofar as it was beneficial to it without adopting the part that was not to its advantage."

A. Davis & Son v. Russian Transport Ins., 169 N.Y.S. 960, 182 Ap. Div. 668.

Dated, San Francisco, California,
April 13, 1948.

Respectfully submitted,
E. M. TAYLOR,
H. A. THORNTON,
THORNTON & TAYLOR,
Attorneys for Appellee.